IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946

No. 45 109

CATHERINE M. O'NEILL, as Administratrix,

Petitioner,

*v.*

CUNARD WHITE STAR, LTD.,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF**

SILAS BLAKE AXTELL,
*Attorney for Petitioner.*

RALPH V. CURTIS,
*of Counsel.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Catherine M. O'Neill, as Administratrix of the estate of Richard O'Neill, deceased, respectfully prays for a Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, in the above-entitled case.

### Statement of the Case

This was an action to recover damages for the death of petitioner's husband, Richard O'Neill, who was killed while serving as able seaman aboard one of respondent's

vessels in 1941. Petitioner on November 22, 1944, as administratrix of her husband's estate, brought suit in the United States District Court for the Southern District of New York, by filing a complaint alleging negligence of the respondent and the unseaworthiness of its vessel as proximately causing intestate's death (R. 4), predicating jurisdiction of the District Court upon the Jones Act (46 U. S. C. sec. 688) and laws which govern actions for wrongful death (R. 4), and alleging that the respondent is a foreign corporation with an office for the transaction of business in the City of New York (R. 3).

Petitioner's intestate was an alien, born in Ireland, but was a resident of the United States from 1924 until his death. Likewise his widow, this petitioner, is an alien born in Ireland, and a resident of the United States. Petitioner and her intestate are the parents of four children, citizens born in the United States, ranging in age from two years to nine years at the time of the intestate's death (R. 21). Each parent had taken first papers in naturalization proceedings, indicating their intentions of becoming citizens (R. 44). Petitioner has received no benefits from any public or private fund on account of her husband's death in respondent's service, but is presently relying, and has for several years relied, for support of self and children upon relief payments from the City of New York, where they reside.

Petitioner's intestate had taken employment as a seaman in New York aboard a British ship in 1939 and made subsequent voyages aboard British ships between England and Canada until his death, which was heroic in its circumstances (R. 5), December 1, 1941, on such a voyage, while on the high seas.

The respondent filed an answer pleading under British law as separate and complete defenses the "fellow servant" rule (R. 10), assumption of risk (R. 11), contributory negligence (R. 11), and a one year statute of limita-

tions (R. 12). Respondent then moved to dismiss the complaint for lack of jurisdiction on the ground that both parties were aliens. The motion was granted with leave, however, to the petitioner to amend her pleadings so as to allege facts sufficient to confer jurisdiction (R. 23). The petitioner thereupon served an amended "complaint and libel" *in personam* in admiralty, grounding jurisdiction upon "The General Maritime Law of the United States, including the Federal Statute which governs actions for wrongful death" (R. 26). The action was again dismissed on motion of respondent on the ground that petitioner had failed to fulfill the conditions of the previous order, "without prejudice to the making of a motion * * * for leave to transfer this case to the Admiralty side of this Court" (R. 40). The Court entered an opinion (not officially reported). A motion was duly made by petitioner to transfer the case to the Admiralty side and to permit petitioner to amend her pleadings accordingly (R. 40), including an amendment predicating jurisdiction of the District Court upon "the General Maritime Law of the United States including the Federal Statutes which govern actions and causes for injuries and wrongful death."

The District Judge heard argument and entered an opinion denying the motion on the ground that the acceptance of the case on the Admiralty side on the facts would amount to an abuse of discretion (R. 46) (opinion not officially reported), and so ordered (R. 47). On appeal, the Circuit Court for the Second Circuit held (opinion not officially reported) that the order was appealable (R. 53), that this is a case in which it would be an abuse of discretion *not* to exercise jurisdiction in a suit between aliens (R. 53), but affirmed the order of the District Court on the ground that the claim itself was bad on the merits in so far as the libel invoked the Jones Act (R. 57).

## Jurisdictional Statement

The jurisdiction of this Court is based upon Section 240 (a) of the Judicial Code, as amended, Title 28 U. S. C. A. sec. 347 (a).

The Federal Statute construed by the Court below, which construction is claimed to be in error in this petition, is The Jones Act (June 5, 1920, C. 250, sec. 33, 41 Stat. 1007, Title 46, U. S. C. A., sec. 688).[1]

The date of the judgment sought to be reviewed is March 5, 1947.

The date upon which the application for this writ is presented is within three months following the date for said judgment.

## The Questions Presented

1. Where citizens and residents of the United States have suffered loss by reason of the death of their husband and father, an alien resident, while he was serving as a seaman on the high seas aboard a foreign vessel through the negligence of the ship's owner and his agents, and where the law of the flag of the vessel would debar such persons from any remedy, and where a court of the United States has jurisdiction *in personam* over the parties; does the rule of comity of nations apply so as to support a finding that the rights of such persons depend only upon foreign law, thereby effectively depriving them of any remedy?

2. If question one, above, should be answered in the negative, can the General Maritime Law of the United States including the Jones Act (U. S. Code title 46, sec. 688), which expresses the public policy of the United States in cases of wrongful death of merchant seamen

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[1] Act quoted in full on p. 5.

and which nowhere in its terms is exclusive of foreign ship owners or seamen, afford a remedy to such persons suffering the loss?

## Reasons Relied on for Allowance of the Writ

The question involved in this case is one of Federal law, which has not been, but should be, settled by this Court. The courts of the land in construing the Jones Act[1] in its effect upon the rights and liabilities of foreign seamen and foreign ship owners have had to interpret a statute which nowhere in its terms is limited to American seamen or to American ships.

The Circuit Court of Appeals in holding that the Jones Act was not intended to apply to American seamen aboard foreign ships while beyond the territorial limits of the United States has made a broad and sweeping statement of law that not only deprives this petitioner of any remedy but will also effect the rights of innumerable American and alien resident seamen, regardless of special circumstances, and regardless of the question of comity in individual cases. The effect of this decision is to make the foreign law dominant over the law of the forum in the courts of this land; because it is self-evident that,

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[1] RECOVERY FOR INJURY TO OR DEATH OF SEAMAN.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. March 4, 1915, c. 153, sec. 20, 38 Stat. 1185; June 5, 1920, c. 250, sec. 33, 41 Stat. 1007 (U. S. Code title 46 sec. 688 [46 U. S. C. A. sec. 688]).

in cases of wrongful death, if the Jones Act can have no application, there is no alternative other than the law of the particular foreign flag. The General Maritime Law of the United States recognizes no cause of action for wrongful death other than as provided in specific statutes. (*Western Fuel Co.* v. *Garcia,* 1921, 257 U. S. 233.) If litigants are deprived of a remedy under the Jones Act by the construction of that Statute so sweepingly made by the Circuit Court of Appeals, American courts will have no substantive jurisdiction unless they adopt and apply foreign law, which often may be inconsistent with expressed public policy and inadequate to provide relief.

The last time the question of the rights of seamen aboard foreign vessels was squarely before this Honorable Court was in *Uravic* v. *Jarka Co.* (1931), 282 U. S. 234. Mr. Justice Holmes said (p. 241):

> "If it should appear that by valid contract or special circumstances seamen on a foreign ship should not be protected by the statute, it will be time enough to consider the exception when it is presented."

It is respectfully submitted that this petition presents to this Honorable Court at this time a question of an exception to the general terms of the Act which should be settled in view of its effect upon citizens and residents of the United States.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, should be granted.

Silas Blake Axtell,
15 Moore Street,
New York, New York.
*Attorney for Petitioner.*

Ralph V. Curtis,
*of Counsel.*

In the

# Supreme Court of the United States

October Term, 1946

No. .....

Catherine M. O'Neill, as Administratrix,

Petitioner,

*v.*

Cunard White Star, Ltd.,

Respondent.

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

### Opinions of the Courts Below

The opinion of the Circuit Court of Appeals is a part of the record (R. 51), is not officially reported.

The opinion of The District Court for the Southern District of New York on Petitioner's motion to transfer case to admiralty side is part of the record (R. 45, 46), is not officially reported.

The opinion of the District Court for the Southern District of New York on Respondent's motion to dismiss the complaint is part of the record (R. 36-38), is not officially reported.

## Jurisdictional Statement

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, Title 28 U. S. C. A. Sec. 347 (a).

The Federal Statute construed by the Court below, which construction is claimed to be in error, in this petition, is The Jones Act (June 5, 1920, C. 250, sec. 33, 41 Stat. 1007, Title 46, U. S. C. A., sec. 688).[1]

The date of the judgment sought to be reviewed is March 5, 1947.

The date upon which the application for this writ is presented is within three months following the date of said judgment.

## Statement of the Case

The statement of the case set forth in the accompanying petition for a writ of certiorari is, by reference, made a part hereof.

As this case as presented seeks a review of a judgment of the Circuit Court affirming an order of the District Court denying Petitioner's motion to transfer to the admiralty from the law side of the court, the facts in this case are not in dispute herein and may be assumed from the pleadings.

The sole question raised is one of law as to a court of admiralty's power to take jurisdiction of this case on the original complaint (R. 3) as sought to be amended by Petitioner's motion (R. 40), and to grant relief under the General Maritime Law of the United States including the Federal Statutes which govern actions and causes for injuries and wrongful death.

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[1] Act quoted in full on p. 5.

The District Court denied Petitioner's motion to transfer case to the admiralty side on grounds of discretion as in actions by one alien against another (R. 46) upon the authority of *The Paula,* C. C. A. 2, 91 F. (2d) 1001.

Petitioner's appeal to the Circuit Court of Appeals was brought on grounds that the denial was an abuse of discretion if the case be regarded simply and only as a case arising between aliens, and on the alternative ground that the District Court committed error in denying a forum to a personal representative whose alleged cause of action arose originally in favor of the deceased's dependent widow and children (46 U. S. C. A., sec. 688), the latter being citizens of the United States and, therefore, not to be denied jurisdiction as a matter of discretion applied to aliens.

The Circuit Court of Appeals held that the question of the merits depended upon the test:

> "whether, if O'Neill (the deceased) had been rescued, he could himself have sued for any injuries he might have suffered" (R. 54).

Thus the Court below regarded the cause of action as entirely derivative; that is, that the petitioner must stand in the shoes of her deceased husband, an alien, and prove her cause of action subject to all limitations in the case of aliens. With this consideration of the case as a base, the entire further deliberation of the Court proceeded in terms as if this were a personal injury case brought by an alien seaman for injuries sustained on the high seas aboard a foreign vessel, with consideration allowed to the facts that this seaman was a resident and had reared a family in the United States. The Circuit Court of Appeals made its decision without distinguishing, in any manner, between actions for wrongful death and actions for personal injuries as such different actions affect the rights of parties and the application of the statute, and affect a determination of the question of comity.

## Errors Below Relied Upon Here

## Summary of Argument

### POINT I

The Circuit Court of Appeals erred in failing to hold that the Jones Act expresses the general public policy of the United States in all cases of wrongful death of merchant seamen in accord with the literal terms of the Act.

### POINT II

The Circuit Court of Appeals erred in holding that the wrong in this case as sounding in either contract or tort would depend upon English law unless the Jones Act interposed to change the result. Petitioner argues that the rule of comity of nations giving effect to foreign law shall not be controlling where rights of citizens are concerned.

### POINT III

The Circuit Court of Appeals erred in holding that the merits of the cause of action are derived from the rights of the deceased seaman to bring action had he lived. Petitioner argues that the right of action is separate and distinct, arising in favor of deceased's dependent widow and children.

### POINT IV

The Circuit Court of Appeals erred in holding that so far as the libel invoked the Jones Act, it was bad on the merits, and in affirming the order of the District Court appealed from.

## POINT I

**The Circuit Court of Appeals erred in failing to hold that the Jones Act expresses the general public policy of the United States in all cases of wrongful death of merchant seamen in accord with the literal terms of the Act.**

The Jones Act[1] was enacted as an amendment to the Seamen's Act of 1915 to bring into the General Maritime Law of the United States a remedy previously limited and in cases of wrongful death previously unknown. *Western Fuel Co.* v. *Garcia* (1921), 257 U. S. 233; *Lindgren* v. *U. S.* (1929), 281 U. S. 38.

For purposes of construing the statute the intent of the legislators should be understood. That their intent was broader than only to provide to individual litigants a needed remedy consistent with new remedies granted ashore can be seen in that the Jones Act was enacted as part of an act, the expressed object of which was

> "to provide for the promotion and maintenance of the American merchant marine." Merchant Marine Act (June 5, 1920, c. 250, 41 Stat. 1007).

See *Panama R. Co.* v. *Johnson* (1924), 264 U. S. 375, 389, holding the Jones Act constitutional.

The act referred to is the Merchant Marine Act of 1920, a post-World War I act passed under circumstances and national needs which can readily be understood in their similarity to present day, post-World War II conditions. The considerations were a greatly expanded merchant marine and the necessity of legislative steps, to the full extent of Congress' power, to keep that merchant marine active and healthy.

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[1] See footnote 1, p. 5 (Act quoted in full).

Mr. Justice Van Devanter in the *Panama R. Co.* case, *supra,* stated on page 392,

> "The statute extends territorially as far as Congress can make it go, and there is nothing in it to cause its operation to be otherwise than uniform."

The case of *Stewart* v. *Pacific Steam Navigation Co.* (D. C. N. Y. 1924), 3 F. (2d) 329, opinion of L. Hand, then District Judge, correctly construes the legislative intent in enacting the Jones Act (p. 329).

> "As I have already said the language is general. There is no indication of any purpose to limit it to United States corporations, and it would be highly unreasonable to impute any such purpose to Congress, for the result would be, not only to deprive American seamen of the protection which the act was meant to give them when serving on foreign ships, but to give advantage to such ships as against American ships. *We all know that the purpose of Congress was directly the opposite.*" (Italics supplied.)

It would seem clear then that the legislative intent was to declare its maximum power over the subject matter, limited only as a sovereign's intent can be limited; and courts of the United States having admiralty jurisdiction became empowered to render judgments in wrongful death cases over all parties properly before them. The Act expressed the public policy of the United States, and was another example of the nature of our admiralty and maritime law to stay

> "• • • flexible enough to keep in step with advancing civilization and to do its part in fulfilling the spendid destiny of this republic on the sea." *The Nanking* (D. C. Cal. 1923), 292 F. 642.

In the recent case of *Kyriakos* v. *Goulandris* (C. C. A. 2, August 3, 1945), 151 F. (2d) 132, suit under Jones Act for negligent injury in a United States port was brought by a Greek seaman signed upon a Greek ship against his Greek employers.

The Court in the *Kyriakos* case, *supra,* found that the libellant had not acquired a residence in this country and proceeded to construe the Jones Act with reference to rights of foreign seamen under the Act. It said on page 136:

> "When Congress used the word 'seaman' in the Jones Act it employed a word of general application, embracing men of any nation who sail the seas. Had it wished to limit the application of the statute to *seamen of American citizenship or residence* the words to effectuate the limitation were at hand. The legislators did not see fit to use them. With the adjective 'American' applied to seamen in the title of the very act of which the Jones Act was an amendment, we cannot suppose that its omission from the statute itself was merely an oversight. Instead, it appears evident that Congress deliberately chose to leave the word 'seaman' its full and unrestricted meaning applicable to aliens and Americans alike, unless in cases like *The Paula,* 91 F. (2d) 1001, which we think may be distinguished in the way hereafter to be mentioned." (Italics supplied.)

The Circuit Court of Appeals in this case held that it was encumbent upon the petitioner to

> "prove that Congress meant to impose duties upon the nationals of other states while they were beyond the territorial limits of the United States" (R. 56).

L. Hand, C. J., inferred that Congress might even go so far as that but considered such a result an extreme

exercise of power lacking clear warrant, and further considered such a result, if allowed, an occasion for ill will between nations and of no value to the seamen themselves in the long run. On this construction of Congress' purpose, Petitioner's appeal was denied.

It is submitted that the Court below has erred in its requirement of proof of this cause of action. The Statute cited was passed in language of universal application providing a remedy for certain torts occurring anywhere upon navigable waters. Thus it became part of the general maritime law as known and administered in Courts of the United States in all proper cases. The question of the intent of Congress to hold foreigners liable under the Jones Act is answered by known principles of Conflict of Laws. The answer always depends upon facts and circumstances of each case, whether the foreign law or the law of the forum will prevail. It is a matter of jurisdiction and of comity, certainly not a matter of deliberate intent to hold all foreigners liable in all cases.

Circuit Judge Hand's stringent requirement is partially satisfied in his own words in the earlier case of *Stewart* v. *Pacific Steam Navigation Co.* (D. C. N. Y. 1924), 3 F. (2d) 329 (p. 331):

> "A certain amount of business must be carried on within the United States in order to get any personal jurisdiction, and that is the imputation which the statute carries along with others of the same kind."

The above quotation reveals the jurisdictional requirement that must be met in all such actions and that was met in this action in which both respondents and decedent's beneficiaries are here. The further question of comity as applied to the facts in this case will be discussed under the next point.

A literal acceptance of the construction of the Act made by the Circuit Court would deprive this worthy petitioner

of any chance of a recovery. It should not be presumed that Congress intended that under no circumstances should a cause of action arise against a foreign shipping company in favor of residents and citizens of the United States solely because the act of negligence occurred without the territorial waters. Such a construction would leave a void in the system of law developed in this country for the protection of all deserving and proper parties.

## POINT II

**The Circuit Court of Appeals erred in holding that the wrong in this case as sounding in either contract or tort would depend upon English law unless the Jones Act interposed to change the result. Petitioner argues that the rule of comity of nations giving effect to foreign law shall not be controlling where rights of citizens are concerned.**

The Circuit Court of Appeals in its opinion stated (R. 55):

> "The wrong may be regarded as sounding either in tort or in contract; and in either aspect it would of course depend upon English law except as the Jones Act by fiat of Congress interposed to change the result."

Further on the Court continued, posing the question of law to be applied in this case, in these words (R. 56):

> "In the case at bar * * * we are to say, not when the Jones Act should give place to the law of the flag, but when the law of the flag should give place to the Jones Act in places where the Jones Act does not expressly apply."

The Court then proceeded to indicate its conviction that the law of the flag would prevail for want of any evidence

of the intention of Congress that the Act itself should prevail over the so-called "law of the flag".

A cursory analysis of the opinion of the Court below and in particular of the parts of it quoted above will show that the Circuit Court has adopted the law of the flag as having force and effect in direct conflict with a certain statute under the laws of this nation.

If a recognition of the law of the flag as expressive of foreign law is a matter of comity (*The Brantford City*, 29 Fed. 373), then it is clear that the Circuit Court has held without explanation or development of the question that comity will be applied in the facts and circumstances of this case.

Petitioner argues that such a holding is in error; that the first question presented by the proceedings is whether this is a case to be decided under the law of the forum, looking to the General Maritime Law of the United States, or whether as a matter of comity the Court should adopt foreign law. If the latter choice should properly prevail, it is evident under the pleadings, and is conceded, that the petitioner would be non-suited. The petitioner would find it impossible to overcome such defenses interposed by the respondent under English law, or the so-called "law of the flag," as the fellow servant doctrine, assumption of risk, contributory negligence as a complete bar, and a one-year statute of limitations (R. 10-12).

On the other hand, if the Court should consider the former proposition, i.e. that the law of the forum should be applied, the General Maritime Law of the United States applicable to actions for wrongful death should be looked to for remedy, and the statute that would apply, The Jones Act, as part of that General Maritime Law, should be given its literal application as an expression of the public policy of this nation to give an adequate remedy to dependents of seamen wrongfully deprived of their lives in the course of their employment. When such

statutes as expressive of general policy are construed, they should not be subjected to the narrow test of the specific intention of Congress that they prevail in all cases over foreign law. It should be evident that Congress intended them to apply in all proper cases where the law of the United States can be properly applied without inhibitory reservations concerning their possible conflict with differing foreign laws.

The case of *The Brantford City* (D. C. N. Y. 1886), 29 Fed. 373, presents a learned discussion of the general subject matter which is involved in this petition. It was a case sounding in negligence in which the principal defense set up was a stipulation in a contract of stowage excepting the ship owner from responsibility for negligent stowage and negligent navigation. It was argued in defense of the action that the stipulation, although invalid in this country, was valid under the law of the flag of the vessel (British law) and that the law of the flag should be applied. The District Judge stated (pp. 383, 384):

> "The 'law of the flag', so called, which it is urged should govern the case, does not embody any rule of legal construction. Literally, it is but a concise phrase to express a simple fact, namely the law of the country to which the ship belongs, and whose flag she bears, whether it accords with the General Maritime Law or not. Insofar, however, as the law of the flag does not represent the General Maritime Law, it is but the municipal law of the ship's home. It has, therefore, no force abroad except by comity, unless some reason appear in the particular case why it should be preferred to the law of the forum. The most frequent and controlling reasons are the actual or presumed intent of the parties, or the evident justice of the case arising from its special circumstances. On this ground the law of the ship's home

is applied, by comity, to regulate the mutual relations of the ship, her owner, master, and crew, as among themselves, their liens for wages and modes of discipline. *The Johann Friedrich,* 1 W. Rob. 35; *The Enterprise,* 1 Low 455; *The Wexford,* 3 Fed. Rep. 577; *The J. L. Pendergast,* 29 Fed. Rep. 127. For the same reasons it is also applied, by comity, to torts on the high seas, as between vessels of the same nation, or vessels of different nations subject to similar laws, though not if they are subject to different laws. *The Scotland,* 105 U. S. 24, 30."

Although the seaman whose death gave rise to this cause of action was a resident alien aboard a resident alien's vessel, it should not be overlooked that the petitioner in whose favor the alleged cause of action has arisen represents not the seaman but herself, as widow, and her citizen children. The question whether the cause of action is originally her own or merely derived from the deceased will be discussed at length in the next point. However, the fact that residents and citizens of this country are vitally concerned with the outcome of the holding in this case deserves the most pointed consideration in the question of comity. See *11 Am. Jur. Conflict of Laws,* Secs. 125, 126, cited with approval *May* v. *Mulligan* (D. C. Mich. 1941), 36 F. Supp. 596, 598, aff'd 117 F. (2d) 259, cert. den. 312 U. S. 691.

The above cited text, discussing the question of the effect to be given to foreign law in contract cases, states, in part:

"Ordinarily, the *lex fori* will not permit the enforcement of a contract regardless of its validity where made or where to be performed, where the contract in question is contrary to good morals, where the state of the forum or its citizens would be injured through the enforcement by its Courts of con-

tracts of the kind in question, where the contract violates the positive legislation of the state of the forum—that is, is contrary to its constitution or statutes—or where the contract violates the public policy of the state of the forum."

This Honorable Court in the case of *Oceanic Steam Navigation Co. Ltd.* v. *Wm. J. Mellor (The Titanic)* (1913), 233 U. S. 718, opinion of Justice Holmes, gave to owners of British vessels the right to limit their liability in United States Courts under the law of the United States, even where the foreign limitation laws differ from the United States laws. Justice Holmes says (p. 732):

> "It is true that the act of Congress does not control or profess to control the conduct of a British ship on the high seas. See *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 356, 53 L. Ed. 826, 29 Sup. Ct. Rep. 511, 16 Ann. Cas. 1047. It is true that the foundation for a recovery upon a British tort is an obligation created by British law. But it is also true that the laws of the forum may decline altogether to enforce that obligation on the ground that it is contrary to the domestic policy, or may decline to enforce it except within such limits as it may impose. *Cuba R. Co.* v. *Crosby*, 222 U. S. 473, 478, 480, 56 L. Ed. 274-276, 38 L. R. A. (N. S.) 40, 32 Sup. Ct. Rep. 132; Dicey, Confl. L. 2d Ed. 647. It is competent, therefore, to Congress to enact that, in certain matters belonging to admiralty jurisdiction, parties resorting to our courts shall recover only to such extent or in such a way as it may mark out. *Butler* v. *Boston & S. S. S. Co.*, 130 U. S. 527 (32 L. Ed. 1017; 9 Sup. Ct. Rep. 612)."

Certain language unfavorable to the petitioner is found in *The Seirstad*, D. C. 27 F. (2d) 982; *The Hannah Nielsen*, D. C. 25 F. (2d) 984; *The Paula*, C. C. A. 2, 91 F.

(2d) 1001; Cert. Den. *Peters* v. *Lauritzen*, 302 U. S. 750. It should be noted that the facts in the above cited cases differ from the instant case so that effect is given to foreign law therein on grounds of comity either expressly or impliedly. The said cases lack the impelling circumstance, the hope of any remedy whatsoever for citizens and residents of the United States standing in jeopardy, which circumstance so strongly colors this case.

The Circuit Court of Appeals has in effect declared that in this case, concededly deserving a hearing, a Court of Admiralty of the United States, having jurisdiction of all the parties, has at its disposal to right a wrong no law of the United States adequate to achieve the desired end. It is submitted that the Congress of the United States did not intend that such a void should exist; and therefore, the Circuit Court has expressed an anomaly which should be overruled.

## POINT III

**The Circuit Court of Appeals erred in holding that the merits of the cause of action are derived from the rights of the deceased seaman to bring action had he lived. Petitioner argues that the right of action is separate and distinct, arising in favor of deceased's dependent widow and children.**

The Court below in passing upon the nature of the cause of action alleged, stated the question as follows (R. 54):

> "Thus the question arises whether the claim is good on the merits, which means whether, if O'Neill had been rescued, he could himself have sued for an injury he might have suffered."

The Court, then, looked only to the deceased in his status as an alien domiciled in the United States with a

family and questioned whether such an alien could have sued a foreign corporation for injuries received on a voyage between foreign ports on the high seas. In the light of these qualifications the Court construed the intent of Congress in passing the Jones Act and concluded that the said Act could not be applied to the deceased in this case, and went even further in holding that American seamen in general would be precluded if injured under circumstances pertaining in this case.

Your petitioner contends that such a narrow construction of the intent of Congress has operated unfavorably on nationals of this country, in this case in such a way as Congress could hardly have intended. The error implicit in the rationale of the Circuit Court lies in its refusal to consider this case throughout as a death action, separate and distinct in its essential nature from an action for personal injury, even though the two different causes of action may arise under the same statute. *Van Beeck, Administrator* v. *Sabine Towing Co.* (1937), 300 U. S. 342. The effect of the reasoning of the Circuit Court was to ignore the real parties in interest, i.e. the survivors, in a death action arising under the Jones Act.

The deceased in this case was washed overboard. There is no evidence or claim that he suffered pain and agony before dying, or other personal loss that could be the subject of a claim under the 1910 Amendment to the Federal Employers' Liability Act (Apr. 5, 1910, C. 143, Sec. 2, 36 Stat. 291; 45 U. S. C., Sec. 59) made a part of the United States Maritime Law by the Jones Act (46 U. S. C., Sec. 688), which continues any cause of action belonging to a decedent.. Instead, the allegations in the complaint show that the action can only lie under Sec. 1 of the Federal Employers' Liability Act (Apr. 22, 1908, C. 149, Sec. 1, 35 Stat. 65; 45 U. S. C., Sec. 51), which creates a new cause of action separate from any claim on behalf of the estate of the employee. This

new cause of action arises originally in favor of certain classes of survivors or dependents of the employee, and recovery is limited to their sustained losses. The first class of survivors to receive any benefit of the action is "the surviving widow or husband and children of such employee." The person authorized to prosecute the action is the personal representative of the deceased employee. This condition of the law is clearly stated by Supreme Court Justice Cardozo in his opinion in *Van Beeck, Administrator* v. *Sabine Towing Co., supra,* holding that a cause of action for wrongful death pleaded under the Jones Act brought by the mother of the deceased was in its legal nature an action to compensate her for the pecuniary loss caused to her by the negligent killing of her son and that therefore the mother's death did not abate the suit brought by her in her lifetime, and stating (p. 349):

> "To that extent, if no farther, a new property right or interest, or one analogous thereto, has been brought into being by legislative action."

Mr. Justice Cardozo in that case made the statement (pp. 350, 351), that:

> "Death statutes have their roots in dissatisfaction with the archaisms of the law which have been traced to their origins in the course of this opinion. It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied."

Part of his analysis of the nature of death actions arising under Federal statutes for the benefit of seamen and railroad workers follows (p. 346):

> "As already pointed out, the personal representative of a seaman laying claim to damages under the Merchant Marine Act is to have the benefit of 'all

statutes of the United States conferring or regulating the right of action for death in the case of railway employees,' 46 U. S. C., Sec. 688. The Statutes thus referred to as a standard display a double aspect. One of these is visible in the Employers' Liability Act as it stood when first enacted in 1908. Under the law as then in force (April 22, 1908, C. 149, Sec. 1, 35 Stat. 65; 45 U. S. C., Sec. 51), *the personal representative does not step into the shoes of the employee, recovering the damages that would have been his if he had lived.* On the contrary, by Sec. 1 of the Statute a new cause of action was created for the benefit of the survivors or dependents of designated classes, the recovery being limited to any losses sustained by them as contrasted with any losses sustained by the decedent. *Michigan Cent. Ry. Co.* v. *Vreeland,* 227 U. S. 59, 68; *Gulf Col. & Sante Fe Ry. Co.* v. *McGinnis,* 228 U. S. 173, 175; *North Carolina Ry. Co.* v. *Zachary,* 232 U. S. 248, 256, 257; *Chesapeake & Ohio Ry. Co.* v. *Kelly,* 241 U. S. 485, 489. However, with the adoption of an amendment in 1910 (April 5, 1910, C. 143, Sec. 2, 36 Stat. 291; 45 U. S. C., 59), a new aspect of the statute emerges into view. Sec. 2 as then enacted continues any cause of action belonging to the decedent without abrogating or diminishing the then existing cause of action for use of his survivors. *St. Louis I. M. & S. Ry. Co.* v. *Craft,* 237 U. S. 648, 657; *Great Northern Ry. Co.* v. *Capital Trust Co.,* 242 U. S. 144, 147.

" '*Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced by the other.* One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death.'

*St. Louis I. M. & S. Ry. Co.* v. *Craft, supra* (p. 658). It is the loss of this last order, and no other, that is the subject of the present suit. So far as the record shows, the seaman died at once upon the sinking of the vessel. In any event there is no claim that his injuries were not immediately fatal." (Italics supplied.)

Looking now at the survivors in this case, those who are the real parties in interest and whose status alone should be considered in determining this case, it appears that the widow is a resident alien, but that her four children, all minors, are citizens of the United States. The children are in the same statutory group of survivors with the widow (45 U. S. C., Sec. 51). The citizenship status of the widow cannot prevail over that of the children to defeat any of their rights as citizens. The fact that the deceased seaman was an alien should be held irrelevant in this cause of action for reasons above pointed out, and only the survivors looked to for a determination of rights of parties.

So the real nature of this action appears as an action for or by citizens joined with an alien against a foreign shipping company, not, as had been assumed by the Court below, as simply and clearly an action between aliens.

It is not contended that the deceased can properly be overlooked altogether, for concededly it is his death that gave rise to the injuries complained of. The essence of your petitioner's argument is that, since her cause of action is separate and distinct as demonstrated above, brought to recover her own pecuniary loss and that of her children, a careful distinction giving all consideration to the parties and to the true interests involved should be drawn for the purpose of construing the meaning of the statute.

It is true that the cases cited by the Circuit Court[1] use language indicating that a recovery under the Federal Employers' Liability Act (Apr. 22, 1908, C. 149, Sec. 1, 35 Stat. 65; 45 U. S. C., Sec. 51), depends upon a right existing in the deceased to have brought his own action for personal injuries had he survived. All of the said cases were decided previous to the *Van Beeck* case and should be read in conjunction with that case.

The facts in those cases may be distinguished from the facts in this case in that, in the former, circumstances arose under which no death statute whatsoever, English or American, could in its terms and meaning have afforded the relief demanded. In this case your petitioner should be qualified, as representing herself and her citizen children injured in a form of property right, to ask for her relief under an American statute which, if applied at all, should be applied fully without the qualification insisted upon by the Circuit Court of Appeals that the deceased, had he survived, should himself have been eligible to ask for relief under American law.

The original wrongful death statute, the *Lord Campbell's Act* (1846, 9 and 10 Vict. C. 93), in its first section provided the remedy only against such persons "who would have been liable had death not ensued." Many state statutes were closely patterned on this Act, as was the Federal statute known as the *Death On The High Seas Act* (Mar. 30, 1920, C. 111, Sec. 1, 41 Stat. 537 [46 U. S. C., Sec. 761]). The qualification in this line of statutes has affected the construction of all death statutes whether such be expressed or not. *Michigan Central R. R.* v. *Vreeland,* 227 U. S. 59. However, it should be noted that there is no such express provision in the Jones

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[1] *Michigan Central R.R.* v. *Vreeland,* 227 U. S. 59, 70; *Frese* v. *Chicago, Burlington & Quincy R.R. Co.,* 263 U. S. 1; *Davis, Agent* v. *Kennedy,* 266 U. S. 147; *Mellon, Director General* v. *Goodyear,* 277 U. S. 335.

Act or in the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51). It is respectfully submitted that in the light of the holdings in the *Van Beeck* case and in the recognized policy of liberal construction of the *Seamen's Act* that strict requirement of the deceased's qualification should not be made a condition precedent in a case of this nature. Here the cause of action is recognized; a statute exists adequate in its terms to afford relief; therefore the only open question should be the qualification of the particular parties. It is not appropriate to exclude the parties by diminishing the statute through a "narrow or grudging process of construction." (Words of Mr. Justice Cardozo, cited *supra*, p. 22.)

## POINT IV

**The Circuit Court of Appeals erred in holding that so far as the libel invoked the Jones Act, it was bad on the merits, and in affirming the order of the District Court appealed from.**

## Conclusion

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, should be granted.

Silas Blake Axtell,
15 Moore Street,
New York 4, New York.
*Attorney for Petitioner.*

Ralph V. Curtis,
*of Counsel.*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946

No. 1445 109

CATHERINE M. O'NEILL, as Administratrix,
*Petitioner,*

*against*

CUNARD WHITE STAR, LTD.,
*Respondent.*

**BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.**

GEORGE DEFOREST LORD,
*Counsel for Respondent.*

JAMES S. HEMINGWAY,
WILLIAM J. BRENNAN,
*Of Counsel.*

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# Supreme Court of the United States

OCTOBER TERM, 1946

No. 1445

CATHERINE M. O'NEILL, as Administratrix,
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CUNARD WHITE STAR, LTD.,
*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

### Statement

The petitioner, as Administratrix of an alien resident foreign seaman, serving upon a foreign ship, who signed shipping articles in a foreign port and who lost his life on shipboard during the course of a voyage while the ship was on the high seas between England and Canada, asks this Court to declare that the unanimous Circuit Court of Appeals was in error in failing to grant Jones Act remedies to the claim of the petitioner. The opinion of the Circuit Court of Appeals affirming the order of the lower court is officially reported at 160 F. (2d) 446.

### The Questions Involved

The petitioner's statement purporting to set forth the "questions presented" to be found on pages 4 and 5 of the

petition herein contains various matters of a purely argumentative and speculative nature and entirely fails to set forth the real questions presented to this Court. In simple terms the questions may be stated as follows:

> *First:* "In a suit brought in admiralty by a personal representative of a deceased seaman to recover for wrongful death, is the right of said personal representative to recover conditioned upon the existence in the deceased seaman at the time of his death of a right to recover for his injury?"
>
> *Second:* "Does the Jones Act apply in a suit in admiralty brought by the administratrix of a resident alien seaman against an alien corporation for wrongful death of the plaintiff's intestate occurring on the high seas during a voyage between foreign ports in one of which the deceased seaman signed shipping articles?"

## The Facts

The facts are undisputed and are fully set forth in the opinion of the Circuit Court of Appeals (R. 51-52) reading as follows:

> "The plaintiff appeals from an order of the District Court, refusing to transfer her action from the law to the admiralty side of the court, to be prosecuted as a libel *in personam*. The plaintiff, a British subject, filed a complaint as administratrix of Richard O'Neill, her husband (also a British subject) against the Cunard Line, a British corporation having a place of business in the Borough of Manhattan. She sued to recover damages resulting from the intestate's death, while serving as an able seaman upon a ship belonging to the defendant. O'Neill had 'signed on' in London for a voyage to Canada and return; and he was washed overboard on the high seas as the result, the plaintiff alleged, of the unseaworthiness of the ship and of the negligence of the defendant's servants. He had come to this country in 1924, had declared his intention of becoming a citizen in 1925, and had resided here ever since, but had never been naturalized. The plaintiff

came here at some time before March, 1932, at which time she declared her intention of becoming a citizen, but she also had never been naturalized. The couple had four children, all born in this country, all of whom resided with their parents in Brooklyn. The defendant moved to dismiss the complaint for lack of substantive jurisdiction on the ground that both plaintiff and defendant were aliens, and the court granted the motion, giving leave, however, to the plaintiff to reframe her complaint, which she did, changing it to a libel *in personam* in the admiralty, based upon the Jones Act and upon 'the Federal Statute, which governs actions for wrongful death.' Again the court dismissed it, without prejudice, however, to transferring it to the admiralty side of the court. The plaintiff, this time as a libellant, then moved so to transfer it; but this the court denied, and it is from that order that the plaintiff has appealed." (R. 51-52.)

## POINT I

### No substantial question of law is presented.

This Court has consistently held that the right to recover for wrongful death is dependent upon the right of the deceased person to recover had he survived.

*Michigan Central R. R.* v. *Vreeland,* 227 U. S. 59, 70;

*Frese* v. *Chicago, Burlington & Quincy R. R. Co.,* 263 U. S. 1, 4;

*Mellon, Director General* v. *Goodyear,* 277 U. S. 335, 344.

The case of *Van Beek, Administrator* v. *Sabine Towing Co.,* 300 U. S. 342, relied upon by the petitioner, is not at variance with the principle enunciated in the foregoing cases. The *Van Beek* case was decided by this Court following the adoption of an amendment in 1910 of the

Employers Liability Act (April 5, 1910, C. 143, Sec. 2, 36 Stat. 291; 45 U. S. C. 59). This Court held that by virtue of this amendment an administrator is permitted to continue any cause of action "belonging to the decedent" as at the time of his death. The amendment was designed to permit recovery for damages sustained by the decedent himself between the date of his injury and his death. In the *Van Beek* case it is apparent that the decedent himself, had he survived, could recover for his injuries under the Jones Act (46 U. S. C. 688) because he was an American seaman on an American ship. There was, therefore, in existence a cause of action "belonging to the decedent" which the administrator was permitted to continue. In the instant case, however, the Circuit Court has found that there was no cause of action under the Jones Act "belonging to the decedent", hence no cause of action under that act for the administratrix to continue.

Neither from the language of the *Van Beek* case nor the statutes, as urged by the petitioner, can it be inferred that beneficiaries of a decedent are entitled to a recovery independent of any right the decedent himself may have had, if he survived.

In the appellate cases where Jones Act remedies have been applied against alien defendants or respondents in favor of alien plaintiffs or libellants, the injuries sued for have occurred within United States Territorial waters and the vessel upon which the injury occurred was bound upon a voyage beginning and ending in the United States.

*Gambera* v. *Bergoty,* 132 F. (2d) 414 (C. C. A. 2d);

*Kyriakos* v. *Goulandris,* 151 F. (2d) 132 (C. C. A. 2d);

*Uravic* v. *Jarka Co.,* 282 U. S. 234.

In the instant case, however, as the Circuit Court pointed out in its opinion (R. 54), the wrongful death occurring as it did to an alien British subject on the high seas between

two foreign ports, the articles having been signed in a foreign port, and the vessel at no time inbound to or outbound from a United States port, there was no justification for a United States Court of Admiralty to apply any law other than the law of England. Should the wrongful death be construed as a tort, this court has held in *The Scotland,* 105 U. S. 24, that the British law will be applicable. Mr. Justice BRADLEY, writing the opinion for this Court, said at page 29:

> "But if the contesting vessels belonged to the same foreign nation, the court would assume that they were subject to the law of their nation carried under their common flag and would determine the controversy accordingly."

See also American Law Institute Restatement of Conflict of Laws, Paragraph 406, reading as follows:

> "*Tort on High Seas.* Liability for an alleged tort committed on board a vessel while the vessel is on the high seas outside the territorial waters of any state is determined by the law of the state whose flag the vessel flies."

If the wrongful death were construed to be a breach of contract, the liability for the breach must, of course, be determined either under the law of the place where the contract was made, which was in England, or the law of the place where the performance allegedly failed, which was on a British vessel on the high seas. In either case, the law of England would be applicable to the exclusion of the United States statutes.

It is to be remembered that in the instant case it is conceded that the petitioner's intestate was an alien at the time of his death (R. 44) and any reference in the opinion of the Circuit Court to the rights of American seamen serving on British vessels should be considered as dicta and unnecessary to the decision in this case.

## CONCLUSION

**The application for a writ of certiorari should be denied.**

Respectfully submitted,

GEORGE DEFOREST LORD,
*Counsel for Respondent.*

JAMES S. HEMINGWAY,
WILLIAM J. BRENNAN,
*Of Counsel.*

FILE COPY



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946

No. [redacted] 109

CATHERINE M. O'NEILL, as Administratrix,

Petitioner,

*against*

CUNARD WHITE STAR LTD.,

Respondent.

## PETITIONER'S REPLY TO RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

SILAS B. AXTELL,
Attorney for Petitioner.

RALPH V. CURTIS,
of Counsel.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946

No. 1445

CATHERINE M. O'NEILL, as Administratrix,

Petitioner,

*against*

CUNARD WHITE STAR LTD.,

Respondent.

## PETITIONER'S REPLY TO RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

### POINT ONE

**This case differs from all those relied upon by the respondent in that in none of them where the torts occurred within the territorial jurisdiction of the United States, did it appear important that the respondent itself, the employer-ship owner, resided within the United States.**

The Court below, in passing upon the question of discretion only, stated a fact that distinguishes this case from all of those brought under the Jones Act cited by the Respondent in its brief. The Court said (R. 54):

"• • • it (the defendant) has for many years conducted a large shipping business from New York—as everyone knows—• • •."

Thus the Court below, at least for a limited purpose, recognized that this case involves a defendant regularly present in the United States and that this is not merely a case of a foreign ship temporarily in United States waters and its owners made thereby incidentally subject to process of United States courts. The Respondent is at all times present and active in this jurisdiction; that is the important distinguishing factor. All the parties are familiars in this land and should not be considered strangers in its courts. However, the Court below failed to carry this concept into its consideration of the merits of the action and thereby erred in non suiting the Petitioner. The Respondent in its argument betrays the same lack in its reasoning.

If this petition is not granted, a rule of law will stand that all foreign shipping corporations operating out of United States ports (often with purchased or leased units of the American Merchant Marine) will be entitled to immunity from the application of the Jones Act as to deaths and injuries occurring on vessels while outside the territorial waters of the United States. The effect of such a rule would be to permit such foreign ship-owners to operate their vessels under a different kind of maritime law than is applicable to American ship-owners to the disadvantage of the latter and to the disturbance of the uniformity of the maritime law as construed and applied in the United States.

Respectfully submitted,

SILAS B. AXTELL,
*Attorney for Petitioner.*

RALPH V. CURTIS,
*of Counsel.*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1947

No. 1445 109

CATHERINE M. O'NEILL, as Administratrix,

Petitioner,

*v.*

CUNARD WHITE STAR, LTD.,

Respondent.

## PETITION FOR PERMISSION TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

ARTHUR DUNN, Esq.,
Attorney for Petitioner,
Friends of Furuseth Legislative Association,
130 West 42nd Street,
New York 18, N. Y.

B. A. GREEN,
Portland, Oregon,

LOUISE A. STEELE,
Los Angeles, California,

ALEXANDER HOWARD,
Mobile, Alabama,
of Counsel.

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IN THE

# Supreme Court of the United States

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*v.*

CUNARD WHITE STAR, LTD.,

Respondent.

## PETITION FOR PERMISSION TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

The determination of questions of law raised in the O'Neill case is of great importance to American seamen and to the people of the United States. The members of this organization are mariners employed in all departments of the vessels. The members of this organization in carrying out the purposes of the founders have directed that this petition for leave to file a brief *amicus curiae* in support of the petition be filed.

WHEREFORE, your petitioner respectfully petitions this Honorable Court for leave to file the accompanying brief *amicus curiae,* and that the judgment of the Circuit Court of Appeals for the Second Circuit should be reversed.

ARTHUR DUNN,
Attorney for Petitioner,
Office and P. O. Address,
130 West 42nd Street,
New York City.

STATE OF NEW YORK,
CITY OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

ARTHUR DUNN, being duly sworn, deposes and says that he is the attorney for the petitioner named in the foregoing petition; that he has read the same, and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

ARTHUR DUNN.

Sworn to before me this
4th day of June, 1947.

IRA EHRLICH,
Attorney and Counsellor at Law in the
State of New York, Residing in Kings Co.
With the powers of a Notary Public.
Kings County and Clk's No. 5, Reg. No. A-124-E-9.
Cert. Filed in N. Y. Co. Clk's No. 191, Reg. No. A-237-E-9.
Commission expires March 30, 1949.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1947

No.

CATHERINE M. O'NEILL, as Administratrix,

Petitioner,

*v.*

CUNARD WHITE STAR, LTD.,

Respondent.

## BRIEF OF *AMICUS CURIAE*

### Preliminary Statement

The question involved is whether or not the courts below have erred in refusing to take jurisdiction of the defendant, a resident steamship corporation which conducts a marine shipping business in competition with American ship owners.

The public are interested in the outcome of the case because there is involved in the decision the public policy of the United States as to equalization of operating conditions of foreign and American vessels, which are competing in freight rates for the carriage of cargoes emanating in the United States for export, and coming to the United States as imports.

On many occasions in appearances before Congress in urging the passage of the LaFollette Seamen's Act or amendments thereof, Andrew Furuseth urged that the laws of the United States passed by Congress for the benefit of American seamen should be equally extended to foreign seamen; that foreign seamen coming into the ports of the United States as members of the crews of foreign vessels would be permitted to leave their vessels without arrest, and that they should be permitted to have access to the courts of the United States to compel the payment of their wages earned under certain circumstances.

Following the passage of the LaFollette Act, the courts of the United States were opened to foreign seamen without the prepayment of fees or costs for the enforcement of their rights to demand half the wages, that they had then earned. Within a year following the general enforcement of the LaFollette Seamen's Act, wages of foreign vessels, due to the freedom thus given to the crews of foreign vessels were doubled, trebled and in some instances quadrupled, and for the period of years thereafter the *real wages* of foreign seamen approximated the *real wages* of American seamen.

The constitutionality of the Seamen's Act as it affected foreign vessels was upheld by this Court. *Dillon* v. *Strathearn*, 252 U. S. 348. At the present time, due to successful efforts of organized American seamen in effecting contracts for wages by collective bargaining, thus wages are double and in some instances more than double those paid to seamen employed on foreign competing vessels.

The LaFollette Seamen's Act of March 4, 1915, after years of petitioning by seamen, was passed by Congress in 1912, but failed to receive the signature of William Howard Taft, the President of the United States. The Act was repassed by Congress and duly signed by Woodrow Wilson, the President of the United States. In this Act, Congress mandated the President to abrogate all treaties between the United States and foreign nations,

which treaties interfered with enforcement of any of the provisions of said Act of Congress. The President did serve notice and said treaties were duly abrogated.

No new treaties depriving courts in the United States of jurisdiction of the claims of foreign seamen for wages arising under the Seamen's Act have been effected since. No Act of Congress has been passed to modify adversely any of the provisions of the Seamen's Act beneficial to seamen. While the Courts of Admiralty of the United States have on numerous occasions taken jurisdiction of claims for personal injuries of seamen injured on foreign vessels, there has been no decision in any case by this court which is determinative of the issues involved in this particular case. There is, we believe, needed a clear declaration and interpretation of the Seamen's Act, particularly as to the amendment known as the Jones Act, June 5, 1930, U. S. Code Annotated 688, as to its application to cases of injuries and death arising on foreign vessels while within the United States, and as to *vessels* owned by *foreign corporations which are residents* and engage in steamship business within the jurisdiction of the United States.

The decision of the U. S. Circuit Court of Appeals in the O'Neill case encourages the transfer of registry of American vessels to foreign registry and flag as shown by the article in New York Herald Tribune of May 12, 1947:

"N. Y. Herald Tribune—May 12, 1947

Foreign Ships Cutting Into U. S. Maritime Lead

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Merchant Marine Institute Says Foreign Craft Take a Rising Share of Trade

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America's position as the world's leading maritime power is threatened by steadily increasing foreign competition, the American Merchant Marine Institute reported yesterday.

Foreign shipping captured an increasing part of American trade in 1946, and foreign cargo fleets are carrying more and more cargoes this year, the institute stated. Last year American cargo ships transported 74.1 per cent of United States exports during the first six months, but carried only 60.7 per cent during the second six months. Imports by the United States on American ships slipped from 67.8 per cent to 58.3 per cent during the same periods.

Growth of foreign competition was attributed by the institute to three factors:

1. Production of large numbers of ships abroad while there is practically no new building in this country.

2. Purchase of more than 800 American war-built ships by foreign interests and operation of approximately 300 American ships by foreigners under lend-lease agreements.

3. Certain countries have expanded their pre-war fleets many times. Among them are Russia, Canada, Brazil and Argentina. Switzerland, Colombia, Costa Rica, Ecuador, Greenland, Iceland and Eire have merchant marines for the first time in history.

Many countries, the institute said, are building up shipping as a source of dollar exchange.

The full impact of increased competition will not be felt until coal and grain relief shipments abroad level off, the institute said. Then, with keen competition for cargoes, the American merchant fleet will be seriously handicapped with its high fixed operating costs."

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## POINT I

**The Seamen's Act of March 4, 1915, including Section 20, as amended by the Jones Act of June 5, 1920, is applicable to accidents arising on foreign vessels while within the waters of the United States and to causes of action arising on foreign vessels owned by foreign corporations resident and doing business within the United States.**

Prior to the passage of the Seamen's Act, wages on foreign vessels averaged from $7.00 to $20.00 a month. Aside from four small passenger ships on the Atlantic Coast, the *"St. Louis"*, *"St. Paul"*, *"Philadelphia"*, and the *"New York"*, and a few vessels running between San Francisco and Hawaii, and San Francisco and Alaska, the United States had no foreign merchant marine. The Seamen's Act was passed at about the same time Congress established a ship building policy for the United States because of the emergency of World War I. Thousands of new American vessels were soon manned by seamen of foreign vessels who had demanded half their wages, and deserted foreign vessels because of the higher wages available on American ships. These seamen were encouraged to and did become citizens of the United States. The courts of the United States were opened to them without the prepayment of fees or costs to enforce their rights under the Seamen's Act.

This Court in 1918 in *Ex parte Abdu*, 247 U. S. 27, held that "courts" of the United States open to seamen did not include "Appellate Courts" but Congress on June 5, 1920, amended Chapter 27, 40 Stat. 157, to read as follows:

> "Courts of the United States, *including appellate courts,** hereafter shall be open to seamen, without

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* Words in italics were added by the Amendment.

furnishing bonds or prepayment of or making deposit to secure fees or costs, for the purpose of entering and prosecuting suit or suits in their own name and for their own benefit for wages or salvage and to enforce laws made for their health and safety (June 12, 1917, c. 27, Sec. 1, 40 Stat. 157; July 1, 1918, c. 113, Sec. 1, 40 Stat. 683)."

At the end of the last War the Standard Oil Company of New York attempted to operate its tankers under the British flag in order to hire crews at lower than the American rate of wages. The case came before the United States District Court, Southern District of New York, in *Mattes* v. *Standard Transportation Company, Ltd.*, 274 Fed. 1019 (April 26, 1921). We quote from the opinion of the Trial Court, page 1021:

"The Wabash had shipped a Chinese crew at Calcutta or Bombay and these had deserted in New York. Their desertion may be attributed to the recent laws which enable them to ship here at higher wages and the result was that intended, i.e., to compel the Captain either to raise his wages to the Amerloan standard, $85.00 or $95.00, or take a new crew at those rates."

In the *Lou Ling Sing* case against the same respondent, 274 Fed. 1017 (May 2, 1921), the Court was dealing with the case of a Chinese crew who had subsequently been hired by the respondent and the validity of their demand for half wages was sustained.

In 1924, the same Judge Learned Hand, denied a motion to dismiss a libel of a British seaman to recover damages from a British steamship company which had an office and place of business in the United States. *Stewart* v. *Pacific Steam Navigation Company,* 3 Fed. (2d) 329. At that time, when the construction and ap-

plicability of the various provisions of the Seamen's Act to foreign vessels was frequently before the courts of the United States, it seemed to have been the opinion of District Judge Hand that the Jones Act applied to foreign steamship companies resident and competing with American steamship companies. See page 12 of petitioner's brief.

*"The Badger"*, 246 Fed. 966;
*"The Italier"*, 275 Fed. 712;
*"The London"*, 241 Fed. 863, 154 C. C. A. 565;
*"The Ixion"*, 237 Fed. 142;
*"Rathlin Head"*, 262 Fed. 741;
*"The Meteor"*, 241 Fed. 735;
*"The Haskell"*, 235 Fed. 914;
*"The Delagoa"*, 244 Fed. 835;
*"The Strathern"*, 239 Fed. 583;
*"The Clematis"*, 244 Fed. 484.

In 1928, the Circuit Court of Appeals, Second Circuit, held that the provision opening the courts of the United States to seamen without the prepayment of fees applied to actions brought for personal injuries under the Jones Act. At page 813, the Court said:

> "In *Chelentis* v. *Luckenbach*, 247 U. S. 372, * * * this Section was held not to create a new cause of action but undoubtedly it was nonetheless designed to promote safety of seamen within the meaning of the Section. The fees here in question are certain docket fees allowed to the successful litigant in this court. The Jones Act is an additional remedy to the Seamen's Act and undoubtedly was intended to be consistent with the spirit of that legislation which was directed to promote the welfare of American seamen in the merchant shipping of the United States. In line with this intention, it is apparent that in an action invoking the aid of the Jones Act, which was intended for the welfare of American seamen, the

courts of the United States, both trial and appellate, should be open without the prepayment of costs to seamen. * * *

The application for mandamus is granted."

The Maritime Law of the United States is uniform. The rights of a longshoreman injured aboard a vessel owned by a resident alien, Hamburg American Steam Packet Company, are governed by the laws of the United States.

*Imbrovek,* 234 U. S. 52.

In the *Haverty* case, 272 U. S. 50, this Court held that longshoremen because they do the work traditionally done by mariners are entitled to enforce their rights as seamen under the Jones Act, U. S. C. A. 688.

It must, we submit, necessarily follow that the rights of the citizens of the United States and resident alien competing steamship companies must be governed by the Maritime Law of the United States which include the Jones Act, United States Code Annotated 688.

See *Panama* v. *Johnson,* 264 U. S. 375.

In the interest of seamen's safety and public policy, the LaFollette Seamen's Act required minimum standards of space ventilation, sanitation, in crew quarters, that seamen must be able to understand the orders of the officers, that they should be divided in equal watches. *O'Hara* v. *Luckenbach,* 269 U. S. 364. Subsequently, an international treaty was adopted at London in 1929. In the closing hours of Congress in 1936, this treaty was ratified by the United States Senate in the following language:

"(1) That nothing in this convention shall be so construed as to authorize any person to hold any

seaman, whether a citizen of the United States of America or an alien, on board any merchant vessel, domestic or foreign, against his will in a safe harbor within the jurisdiction of the United States of Amerca, when such seaman has been officially admitted thereto as a member of the crew of such vessel or to compel such seaman to proceed to sea on such vessel against his will;

(2) That nothing in this convention shall be so construed as to nullify or modify Section 4 of the Seaman's Act approved March 4, 1915, 38 Stat. 1164, as intepreted by the Supreme Court of the United States in Strathearn v. Dillon, 252 U. S. 348, and

(3) That nothing in this convention shall be so construed as to prevent the officers of the United States of America who exercise the control over vessels provided for in Article 54 from making such inspection of any vessel within the jurisdiction of the United States as may be necessary to determine that the condition of the vessel seaworthiness corresponds substantially with the particulars set forth in the certificate, that the vessel is sufficiently and efficiently manned, and that it may proceed to sea without danger to either passengers or crew, or to prevent such officers from withholding clearance to any vessel which they find may not proceed to sea with safety, until such time as any such vessel shall be put in a condition so that it can proceed to sea without danger to the passengers or crew."

It is respectfully submitted that this enactment shows that Congress intended to continue the policy of enforcing all of the provisions of the Seamen's Act, including the Jones Act, equally against all vessels entering the waters of the United States and against the owners of all resident steamship companies doing business in competition with owners of merchant vessels of the United States,

and that since citizens of the United States will otherwise be without remedy, the petition for a writ of certiorari herein should be granted.

Respectfully submitted,

ARTHUR DUNN,
Attorney for Petitioner,
Friends of Furuseth Legislative Association,
130 West 42nd Street,
New York, N. Y.

B. A. GREEN,
Portland Oregon.

LOUISE A. STEELE,
Los Angeles, California.

ALEXANDER HOWARD,
Mobile, Alabama,
of Counsel.